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INTEREST OF AMICUS CURIAE[1]

The Product Liability Advisory Counsel, Inc. ("PLAC") is a nonprofit corporation with 114 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to machinery, pharmaceutical products, and medical devices, as well as other consumer products.[2] PLAC's purpose is to file *amicus curiae* briefs on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

PLAC member corporations frequently are sued for personal injury or property damage and are victims of damage awards which are grossly excessive. Its members are fully familiar with the deleterious effects of such awards if left unfettered by the full panoply of available safeguards, including the right of appellate review. Excessive verdicts harm not only individual defendants, but society as a whole. Excessive verdicts, if permitted to stand, lead to an upward spiral of verdicts resulting in ever larger damage awards. The need to provide coverage for such excessive awards has led to a real crisis in the insurance industry, with fewer and fewer insurance companies willing to continue to provide liability coverage. In turn, inability to obtain such insurance has caused many companies to curtail their activities, or to go out of business entirely. Petitioner's and his *amici's* suggestion that appellate review of excessive verdicts be eliminated in its entirety, if accepted, would aggravate an already dangerous situation. Accordingly, *amicus* has a strong interest in assisting this Court to determine the scope of appellate review of excessive federal jury verdicts.

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1. The parties' written consent to the submission of this brief is on file with the Court.

2. PLAC is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Act of 1982. PLAC members are listed in the Appendix.

SUMMARY OF ARGUMENT

Distilled to its essence, petitioner's argument and that of his *amici* is that the Seventh Amendment bars appellate review of a federal jury's damage award for excessiveness and proscribes issuance of appropriate relief. Thus, for example, if a district court jury in a routine diversity "slip and fall" personal injury case awarded plaintiff $100 million for a broken ankle and the trial court denied post-trial relief, the circuit court of appeals, constitutionally speaking, purportedly is paralyzed from finding such award excessive and remitting the amount conditional on a new trial. Petitioner and his "legal history scholars" *amici* gussy up this bizarre proposition with confusing historical references to English common law and artful characterizations of what the Second Circuit decided in *Gasperini*. The result is a legal burlesque.

Why the trial lawyer *amici* wish to shield from appellate review those "runaway" verdicts awarded by inflamed juries is understandable. Hefty contingent fees that follow such awards may well be inspirational. But no amount of inspired verbal sleight of hand justifies the tortured remolding of the Second Circuit's decision, the distortion of fundamentals of English common law, and the artificial attempt to elevate ancient procedural form over substance.

Appellate review of jury verdicts sustained at the trial level - tempered by appropriate appellate deference to the jury's factfinding role and trial court discretion - is a long-standing universal practice. Before this well-accepted and balanced regime may be displaced, petitioner must discharge a heavy burden of proof. That burden simply has not been met. First, this case does not present the legal issue petitioner and his *amici* say it does. The Second Circuit panel did *not* reweigh the evidence nor substitute its finding for that of the jury. A false issue has been presented. We explain below why this Court ought not to grant the relief sought in this case.

Second, the English common law at all relevant times did permit appellate review "above" the trial court level - both a true appellate forum as we know it as well as a form of review that functionally can be classified as "appellate." Moreover, petitioner and his *amici* focus only on ancient procedural forms and titles, not on substance and function. Many procedures in ancient England differed

from ours today. The Seventh Amendment neither intended to nor does confine us to eighteenth century English forms.

Third, the attempt to eradicate normal circuit court remittitur practice via the arguments presented here reflects a misapprehension of what a conditional remittitur really is. In turn, this confirms petitioner's misunderstanding of what the Second Circuit actually did in *Gasperini* and why the well-accepted remittitur practice does not implicate the Seventh Amendment. The truth is that allowing excessive jury tort awards violates essential public policies. Tort law is meant to compensate the losses incurred by those who are injured; to allocate and spread the risk and costs of injuries; and to deter similar tortious misconduct. None of these vital policies are served when excessive awards are shielded and relief not granted. There has been no showing whatsoever that English common law favored permitting excessive verdicts to stand. On the contrary, Blackstone's Commentaries and other sources, as we show below, reveal that exorbitant awards were abhorred. To say that the Seventh Amendment forbids the appellate review and relief in this case is to turn original intent on its head. Petitioner and his trial lawyer *amici*, in effect, argue for imposition of a new tyranny - untouchable sanctity for "runaway" jury verdicts. The Seventh Amendment is not an apt vehicle for creating such new tyrannies.

POINT I

THE SECOND CIRCUIT DECISION IN *GASPERINI* DOES NOT INVOLVE A REEXAMINATION OF FACTS AND DOES NOT IMPLICATE THE SEVENTH AMENDMENT.

The circuit court's decision in *Gasperini v. The Center For The Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), can be divided into two parts, neither of which violates the Seventh Amendment.[3] Thus,

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3. It is questionable whether a constitutional issue truly is presented here, where defendant conceded liability and the only issue presented is one of damages. *Tull v. United States*, 481 U.S. 412, 426 f.n. 9 (1987) ("We have been presented with no evidence that the framers meant to extend the right to a jury to the remedy phase of a civil trial."). Indeed, in an analogous situation, where a defendant has defaulted on the issue of liability, the right to a jury trial on damages has often been questioned. *See,*

(continued...)

while petitioner and *amici* devote inordinate space to the issue whether a federal appellate court can engage in "weight of the evidence" review of a judgment entered pursuant to a jury verdict, that simply is not what happened here. The Second Circuit's order of a new trial was not premised on the "weight of the evidence" but rather on the "insufficiency of the evidence", a recognized legal, not factual, standard. That determination warranted setting aside the jury's verdict and granting a new trial. The second phase of the decision ascertained the amount of damages that could be sustained by the evidence so as to give plaintiff the option of accepting the lower amount rather than burdening the parties and the district court with a new trial. This aspect of the decision, purely optional and not taking from plaintiff a right to trial by jury, likewise does not implicate the Seventh Amendment.

A. *The Finding of Insufficient Evidence*

At issue in *Gasperini* was the proper valuation of photographic transparencies loaned to defendant and admittedly lost. At trial, the jury awarded plaintiff $450,000 in damages, finding that each of the 300 lost transparencies was worth $1500. Defendant's Rule 59 motion for a new trial was denied. On appeal, the Second Circuit, after determining that "New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer," determined that "Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict." 66 F.3d at 429. Unquestionably, this aspect of the circuit court's decision involved pure issues of law. A determination of what elements must be proven as well as a determination of insufficiency of the evidence are all findings of law.

Petitioner's attempt to categorize these determinations as a weighing of the evidence or as a finding of fact are clearly belied by the

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(...continued)

e.g., *Goldman, Antonetti, et. al. v. Medfit International, Inc.*, 982 F.2d 686, 692 (1st Cir. 1993); *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

decision itself. Contrary to petitioner's claim (Pet. Br. at 8), the circuit court did not ignore or discount any evidence which had been presented. Rather, it noted that the expert failed to address the elements which must be proven under New York law and focused instead on a purported "industry standard". Describing the testimony of petitioner's expert as being "of little utility", 66 F.3d at 429, the court observed that "[h]er explanation for this valuation, however, said a lot about the alleged industry standard and virtually nothing about either uniqueness or earning level." The circuit court's conclusion that there was insufficient evidence to sustain the jury verdict, is a determination of law. Consistent with the common law, circuit courts have the power to set aside a jury verdict based on the insufficiency of the evidence and to order a new trial. *See Slocum v. New York Life Insurance Company*, 228 U.S. 364, 400 (1913). In this regard, the Second Circuit specifically found that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly original." 66 F.3d at 429.

After noting that the object of tort damages is to make plaintiff whole and not "to be a winning lottery ticket", the circuit court concluded:

> "In light of Gasperini's failure to make an effective showing that all 300 lost transparencies were unique, and the strong evidence of Gasperini's limited earning power as a photographer, the jury's award of $450,000 cannot be regarded as anything but a financial windfall for Gasperini." *Id.*

The court of appeals' finding of insufficient evidence furnished ample legal ground to set aside the jury verdict and remand for a new trial. Accordingly, that portion of the determination is certainly not subject to constitutional challenge.

B. *The Remittitur Conditioned on a New Trial*

The second phase of the circuit court determination is one by which plaintiff is not aggrieved and which is equally free of constitutional infirmity. Having determined that the jury verdict could not be sustained for legally insufficient proof the court then reviewed the evidence to determine how much, if any, of the jury verdict could be

sustained. The purpose of this exercise, a common practice in state and federal courts, was to avoid the need to burden the parties and the district court with a new trial.

"Giving Gasperini every benefit of the doubt" and "drawing all inferences in favor of Gasperini" the court concluded that the jury's award of $450,000 "materially deviates from what is reasonable compensation." 66 F.3d at 431. The Second Circuit then found that there may have been as many as 50 transparencies as to which "there was plausible evidence of significant uniqueness" and for which the jury could have awarded Gasperini $1500 per transparency. As to the remaining items the court determined that, in light of Gasperini's limited earnings as a photographer and the lack of uniqueness, any award of more than $100 per transparency could not be sustained by the evidence.

This evaluation of the evidence was not an "against the weight of the evidence" analysis. Rather, it was a sufficiency of the evidence analysis. Thus, any evaluation of evidence in which the court gives a party the benefit of every doubt and draws all inferences in favor of that party implies a determination of evidentiary sufficiency. The court's exercise was a determination of law, not fact. And it was made in pursuit of the conditional remittitur mechanism, a device with roots in common law that frequently obviates a retrial. The circuit court then gave plaintiff the option of accepting this reduced amount, or proceeding with a new trial. Until this point, the jury award of $450,000 clearly had to be vacated as a matter of law. The award could not stand. A new trial inevitably would be required. The remittitur aspect of the circuit court's decision thus merely established an amount that could be sustained at plaintiff's option. At all times, petitioner's fundamental right to a jury trial was preserved and, therefore, no clash with Seventh Amendment rights occurred. As framed by petitioner, this proceeding presents a false issue since it plainly does not involve an appellate court's review of evidential weight at all.

POINT II

THE SEVENTH AMENDMENT DOES NOT BAR APPELLATE REVIEW OF JURY VERDICTS ON EXCESSIVENESS GROUNDS.

A review of the history of the Seventh Amendment and the cases which have applied it clearly shows that the Amendment does not preclude federal appellate review of jury verdicts for excessiveness. Contrary to petitioner's assertions, when an appellate court is asked to determine if a jury award is excessive, it is not making a *de novo* factual determination, nor is it making its determination based on the weight of the evidence. Accordingly, petitioner's and *amici's* lengthy discussions as to whether or not the Seventh Amendment permits federal appellate courts to engage in *de novo* or "weight of the evidence" review of any fact found by a jury are misleading and really beside the point. While we submit that federal appellate courts do in fact have the power to review facts, the only issue presented here is whether the Seventh Amendment precludes federal appellate review of a trial court's refusal to grant a new trial due to the excessiveness of the jury's verdict. As to that issue the answer must be in the negative.

A. *Excessiveness Review Involves An Issue of Law, Not Fact*

Every federal circuit court has held that appellate review of jury verdicts on the grounds of excessiveness is permissible. *See, e.g. Dagnello v. Long Island Railroad Company*, 289 F.2d 797, 802 (2d Cir. 1961) (citing cases from each circuit). Implicit in these decisions is recognition that appellate review of a trial court's denial of a new trial due to excessiveness of a verdict does not involve a "reexamination of facts". Rather, it presents an issue of law.

Logic confirms the practice. Thus, when an appellate court reviews a damage award to determine whether it comports with an applicable legal standard, it is deciding an issue of law. For example, if New York had a statute which required that a court review a damage award to insure it did not materially deviate from reasonable compensation, and the statute proceeded to list dollar amounts pursuant to a schedule, such as $100,000 for a broken leg, $200,000 for a hip injury or $500,000 for a head injury, whether the trial court correctly applied such statutory guidelines would clearly present an issue of law

on appeal. 6A Moore's, Federal Practice, ¶59.08[6], pp. 59-169; *see, Southern Railway Carolina Division v. Bennett*, 233 U.S. 80, 87 (1914). The fact that the New York statute defining the standard of review does not set forth dollar amounts but allows appellate courts to determine them by reference to awards sustained in other cases, New York Civil Practice Law and Rules 5501(c), does not change the legal issue into one involving a "reexamination of facts". *See, Erie R.R. Co. v.Tompkins*, 304 U.S. 64, 78 (1938) ("And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern.") In undertaking this analysis, the appellate court is not making new findings of fact; rather it is applying to the facts as found by the jury the legally permissible standard of reasonable compensation allowed by state law.

Moreover, if, as petitioner concedes (Pet. Br. at 38), a trial court may set aside a jury verdict as excessive, order a remittitur conditioned on a new trial then certainly the circuit court, consistent with the Seventh Amendment, can determine whether the district court abused its discretion. It is settled that review of a determination by a district court under an abuse of discretion standard presents a question of law. Whether defined as "a definite and firm conviction that the trial court committed a clear error of judgment," *Logan v. Dayton Hudson Corporation*, 865 F.2d 789, 790 (6th Cir. 1989); or "an 'absolute absence of evidence to support the jury's verdict,'" *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991); or "(1) the court's decision is 'clearly unreasonable, arbitrary or fanciful'; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the district court rationally could have based its decision," *Heat and Control Inc. v. Hester Industries Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986), the standards for reviewing an abuse of discretion clearly present an issue of law, not fact. Here, the Second Circuit's determination that the damage award was not supported by the evidence, and that the trial court therefore abused its discretion in failing to order a new trial, was a determination of a legal issue. Such a ruling plainly is consonant with the Seventh Amendment.

B. *The Common Law Clearly Permitted Appellate Review For Excessiveness*

In addition to guaranteeing the right of jury trials in civil cases, the Seventh Amendment bars the "reexamination" of facts found by a jury other than as under the rules of the common law. That provision does not preclude appellate review of excessive verdicts. Thus, it was a well-accepted practice under the common law for appellate courts to order a new trial when the jury had rendered an excessive verdict. Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 53 (1916). According to Professor Fleming James, Jr., "[t]he practice of granting new trials because the verdict is excessive was well established at common law when our constitutions were adopted." James, *Remedies For Excessiveness or Inadequacy of Verdicts*, 1 Duq. L.R. 143 (1964).[4]

Judge Edwin Holmes, in his scholarly dissenting opinion in *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475, 477-484 (5th Cir.), *cert. denied*, 342 U.S. 828 (1931),[5] elaborated the historical right of a circuit court of appeals to set aside a jury verdict on grounds of excessiveness, and to order a new trial. While, as this Court noted in *Honda Motor Co. v. Oberg*, 512 U.S. ____, 129 L.Ed.2d 336, 344 (1994), there are few reported cases available from the eighteenth century, Judge Holmes, based on his intensive and systematic review of the classic commentators on English common law, concluded that common law appellate courts had power and authority to review excessive jury verdicts and to order new trials as relief. According to Judge Holmes, "the contention that procedure by remittitur in federal appellate courts is inhibited by the Seventh Amendment is contrary to the teachings of

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4. According to Professor James this differed from additur since "the practice of granting new trials because of inadequacy was not well settled in England at this time." James, *op. cit.*, at 145. This provides the simple explanation for why remittitur is permitted and additur is not.

5. Judge Holmes' dissenting opinion has been cited with approval by various circuit courts, including the Second Circuit in *Dagnello v. Long Island Rail Road Co.*, *supra*, 289 F.2d at 804, and the Seventh Circuit in *Bucher v. Krause*, 200 F.2d 575, 587 (7th Cir. 1953)

Ashton, Bracton, Fleta, Glynn, Coke, Mansfield, and Blackstone, as to the rules of the common law of England." 187 F.2d at 480. In addition, Judge Holmes cited the case of *Ducker v. Wood*, 1 Term Reports 277 (K.B. 1786), where Lord Mansfield held that there was no doubt but that the court had the power to take the opinion of a second jury where the damages awarded by the first jury were excessive. 187 F.2d at 479, 483.

Judge Holmes cites both Blackstone and Bracton for the proposition that, while the responsibility to review a jury verdict lies initially with the trial court, where the latter fails to fulfill its responsibility the task can be undertaken by a higher court. Thus, in olden times, although the motion for a new trial preceded entry of judgment,

> "[n]ot only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this 'or could not decide it,' as Bracton said, 'it was referred to a higher tribunal.'" 187 F.2d at 479.

The procedure of referring the issue of excessive damages to a higher tribunal was one of the things that Blackstone said "rendered perfect the most excellent method of decision which was the glory of the English law." Blackstone's Comm., Vol. III, p. 391.

Indeed, in *Honda Motor Co. v. Oberg, supra*, this Court recognized that early English cases "steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high". 129 L.Ed 2d at 343.[6] Thus, appellate review of excessive damage awards is premised on a long history dating back to the English

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6. It is clear from a review of the cases cited by this Court in *Honda, supra*, that the determination whether or not to grant a new trial on the grounds of excessiveness was not decided by the trial judge. Rather, the determination was made by a group of judges who made their decision after reviewing the evidence and, in certain cases, after comparing the awards in these cases to the awards in other cases for similar injuries, the very standard now in effect in New York to which petitioner so strenuously objects. See, *e.g.*, *Goldsmith v. Lord Sefton*, 3 ANST. 808, 145 Eng Rep. 1046 (Exch 1796).

common law. Such review is certainly permitted where the appellate court does not direct entry of judgment but rather remands the matter for a new trial.

C. *The Practice of Conditional Remittitur is Constitutionally Sound*

The remittitur aspect of the *Gasperini* decision is equally unobjectionable. In the second part of its decision the circuit court determined the maximum award of damages that could be sustained by the evidence when viewed in the light most favorable to plaintiff. The court's finding amounts to a recommendation intended to avoid burdening the district court and the litigants with a new trial. Because the Second Circuit already had determined that the verdict could not be sustained, plaintiff was in any event faced with the prospect of a new trial. The court's grant of a conditional remittitur, which left the option of a new trial open, deprived plaintiff of nothing. If plaintiff deemed the amount proposed by the court to be unfair, he could proceed with the new trial. It also did not violate the defendant's constitutional right to a jury trial. See *Northern Pacific Railroad Co. v. Herbert*, 116 U.S. 642 (1885); *Arkansas Valley Land and Cattle Co. v. Mann*, 130 U.S. 69, 32 L.Ed. 854, 856 (1889) (authority of Court to determine which damages excessive implies authority to determine when they are not). The universally accepted practice of permitting federal appellate courts to review verdicts for excessiveness and to order remittiturs conditioned on new trials is one which does not present an issue of fact and which therefore does not at all implicate the Seventh Amendment.

POINT III

ENGLISH COMMON LAW TOLERATED APPELLATE REVIEW OF FACTS. THE LIMITED SCOPE OF REVIEW BY U.S. FEDERAL APPELLATE COURTS STEMMED FROM THE JUDICIARY ACT, NOT THE SEVENTH AMENDMENT.

Even if the circuit court's review of the verdict and of the district court's refusal to grant a new trial were characterized as a review of the factual findings of a jury, and even if a circuit court's issuance of a remittitur were characterized as a finding that the verdict was unsupported by evidence, the Seventh Amendment is not offended.

The Amendment expressly excepts such reexamination of a jury's factual findings when "the rules of the common law" allow. As we will show, common law courts substantively equivalent to our circuit courts had the power, precisely, to review jury damage awards to determine whether the amount awarded was excessive and against the weight of the evidence. The Seventh Amendment provides no ground to more severely hamstring our circuit courts.

A. *The History of the Seventh Amendment*

Article Three of the Constitution vested judicial power "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Pursuant to Article 3, Section 2, Clause 2, the Supreme Court was given "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." While Article 3 guaranteed a right to trial by jury in criminal cases it did not guarantee a similar right in civil cases.

Shortly after adoption of the Constitution, Congress enacted the Judiciary Act of 1789, creating a system of courts consisting of district courts with original jurisdiction, circuit courts with original and appellate jurisdiction, and the Supreme Court with original and appellate jurisdiction. Judiciary Act, Sec. 1, Sec. 3, and Sec. 4. The Judiciary Act did not provide for the appointment of circuit court judges. Rather, the circuit court consisted of two Supreme Court Justices who were assigned to ride circuit, and a district court judge from within the circuit. Judiciary Act, Sec. 4. The Judiciary Act, Section 17, provided that:

> "*all* said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law." Emphasis added.

In addition, the Judiciary Act delineated the appellate power of the Federal Courts to be limited to a writ of error and further provided as follows:

> "But there shall be no reversal in either [supreme or circuit] court on such writ of error for error in ruling any plea in abatement, other than a plea to the

> jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact." Judiciary Act, Sec. 22.

By limiting the scope of appellate review to the writ of error, Congress essentially authorized this Court and the circuit court to review only issues of law, not issues of fact. That authority was broadened by the Eavarts Act of 1891, which expanded the scope of the circuit court's appellate review to include appeals, and once again in 1948, when the language precluding appellate review of facts was omitted from 28 U.S.C. §2105 and §2106. Apparently constrained by the long practice which had developed when the Judiciary Act of 1789 was in effect, modern day circuit courts have not taken full advantage of the expanded scope of review which is now statutorily permitted.

Almost simultaneously with enactment of the original Judiciary Act, Congress proposed the Seventh Amendment to the state legislatures for ratification. In addition to preserving the right to jury trial in all suits at common law, the Seventh Amendment provided:

> "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Thus, unlike the near-contemporaneous Judiciary Act, the Seventh Amendment did not preclude appellate review of facts in their entirety. Instead, it grafted the rules of the common law onto the federal judicial system.

B. *The Scope of the Seventh Amendment*

Any discussion of the meaning and intent of the Seventh Amendment was quickly laid to rest by Justice Story in his decision in *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433 (1824). Without engaging in any discussion of the issue and without citing any authority, Justice Story described the powers of the courts under the common law "to reexamine facts" tried by a jury, as follows:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a

venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

Despite the Judiciary Act's preclusion of appellate review for errors of fact, thereby making a determination of the Seventh Amendment's scope unnecessary to a resolution of the issue then before the Court, all subsequent cases dealing with the constitutional issue simply picked up Justice Story's language quoted above and held it dispositive of the Seventh Amendment scope of review question. In fact, in *Fairmount Glass Works v.Cub Fork Coal Co.*, 287 U.S. 474, 481-482 (1933), this Court recognized that "the rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact" is premised on the Judiciary Act of 1789, and only sometimes premised on the Seventh Amendment. We respectfully submit that decisions addressing the scope of the Seventh Amendment which predate the amendment of the Judiciary Law in 1948, 28 U.S.C. 2105, must be treated as non-binding *dicta*, since, until that time, any appellate review of facts was in any event foreclosed by the provisions of the Judiciary Act of 1789.[7] Accordingly, there was neither need nor interest for the courts in those cases to reach the constitutional issue or probe the accuracy of Justice Story's observation about common law practice insofar as it applied to appellate review. In fact, there is reason to question the accuracy or breadth of that statement.

C. *The Scope of Appellate Review Under English Common Law*

We respectfully submit that Justice Story did not portray trial and appellate practice under the English common law in its entirety. Accordingly, to the extent that this Court's earlier decisions relied on *Parsons v. Bedford, supra*, they should not be viewed as dispositive of the issues here.

A review of English common law as it existed in 1791, when the Seventh Amendment was adopted, reveals that there was available a form of appellate review of jury verdicts. The judicial system as it

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7. While the Eavarts Act expanded the scope of review to include appeals as well as writs of error, the Judiciary Act still barred review for error of fact.

existed at the common law included the Court of Common Pleas, the Exchequer, and the King's Bench. See, generally, Blackstone, Comm., Vol. III, Chapter IV. The Court of King's Bench had both original and appellate jurisdiction, and had appellate authority to review determinations made at the Court of Common Pleas, and all inferior courts. Blackstone, Comm., Vol. III, pp. 42-43. A party who was dissatisfied with the determination by the King's Bench could appeal to the House of Lords. *Id.* According to Blackstone, the King's Bench was presided over by one or more judges, who sat together in courts that were mutually connected and were interchangeably courts of appeal or advice to each other. Blackstone, Comm., Vol. III, p.356.

Under the English common law, all of the courts were based at Westminster. For the convenience of the parties, witnesses and jurors, the *Nisi Prius* system was created pursuant to which judges of the various courts were assigned to travel and preside over jury trials throughout the country. These *Nisi Prius* judges served by commission and were only authorized to try the issues to be resolved, and to report the results reached by the jury. Riddell, *New Trial at the Common Law, supra*, 26 Yale L. J., at 49, 52. A party dissatisfied with the outcome of the trial could move for a new trial. That motion was presented to an *en banc* panel of judges sitting at Westminster who would review the evidence and determine whether or not a new trial should be granted. *Id.*

Blackstone's Commentaries describes this procedure as follows:

> "Next follows, *sixthly*, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be *suspended*, or finally *arrested*: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, *the party may have relief in the court above*, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not

made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

"1. Causes of *suspending* the judgment, by granting a *new trial*, are at present wholly *extrinsic*, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified by the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*.

...

"*The exertion of these superintendent powers of the king's courts*, in setting aside the verdict of a jury and granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances, in the year-books of the reigns of Edward III., Henry IV., and Henry VII., of judgments being stayed (even after a trial at bar) and new *venire's* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal species of misbehavior." Blackstone's, Comm., Vol. III, pp. 386-387; Emphasis added.

Petitioner insists that this procedure sets forth the model for judicial review of jury verdicts which must be followed in order to comply with the Seventh Amendment, and points to this system in support of his position that only the trial judge at common law is permitted to set aside a verdict as against the weight of the evidence.

This argument is unsupported by the historical evidence upon which it relies. The system described is in actuality more akin to an appellate review than it is to a system where the determination to set aside a verdict is made by the trial judge. Thus, there is no question that the judges who decided the motion for a new trial had not presided over the original trial and had not heard the evidence directly. Indeed, according to the preceding quote from Blackstone, this entire application was made *"in the Court above"*. See also, Pound, *Principles of Practice Reform*, 71 Cent. L.J. 221, 228 (1910), reprinted in Comment, *Federal Review of Excessive Verdicts*, 30 Texas L. Rev. 242, 245 (1951). The mere fact that the judges "in the Court above" had both original and appellate jurisdiction does not change the fact that it was *not* the trial judge reviewing the evidence and making the ultimate determination. Riddell, *op. cit.*, 26 Yale L.J. at 56. In fact, our circuit courts were clearly designed to incorporate the powers of the English court sitting *en banc* to review jury verdicts. Daniel Webster described the circuit courts as follows:

> "The Courts, indeed were called Circuit Courts; which seemed to imply an itinerant character, but, in truth, they resembled much more, in their power and jurisdiction, the English Courts sitting in bench, than the Assizes, to which they have been likened." 2 Cong. Deb. 873-74 (1826), reprinted in Comment, *Federal Review of Excessive Verdicts, supra*, 30 Texas L. Rev., at 244.

Petitioner makes much of the fact that the motion for a new trial had to be certified to the *en banc* panel and argued by the *Nisi Prius* judge. This argument, too, is without foundation. While this may have been the practice in the Court of Common Pleas, it never became the accepted practice in the King's Bench, as Blackstone makes clear. Indeed, at King's Bench the motion was decided on the basis of the *postea*, the predecessor to our Record on Appeal or Appendix. The

description of the procedure by which a new trial was obtained, included in Blackstone's Commentaries, directly contradicts petitioner's arguments:

> "A few years before, a practice took rise in the common pleas, of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence), that the verdict had passed against his opinion; though chief justice Rolle (who allowed of new trials in case of misbehavior, surprise, or fraud, or if the verdict was notoriously contrary to evidence) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon affidavits; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." Blackstone's Comm., Vol. III, p. 388.

Moreover, even assuming that petitioner's argument were factually correct, it still would not be dispositive of the issue presented here. Rather, it appears that the "information" which had to be certified by the trial judge was merely a function of the fact that at that time trial records were not transcribed, and the trial judge was the only person who could dispassionately present the facts of the case to "the Court above". Thus, according to Blackstone's Commentaries, a motion for a new trial would only be granted where sufficient ground to warrant a new trial was presented by the parties.

> "A sufficient ground must however be laid before the court, to satisfy them that it is necessary to justice that

> the cause should be farther considered. If the matter be such, as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled." Blackstone's Comm., Vol. III, pp. 391-392.

The right to have a new trial granted by "the Court above" was viewed as a desirable aspect of the right of *appeal:*

> "If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing: which might be reviewed in a course of appeal. Blackstone's Comm., Vol. III, p. 390.

Moreover, the procedure which permitted "the Court above" to grant a new trial was viewed as a means of insuring a fair determination without impinging in any way on the right to trial by jury. Thus, contrary to petitioner's gloss, the policy of the common law was to enhance the right of trial by jury by insuring that jury verdicts were in fact reviewable.

> "Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one

> side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case." Blackstone's, Comm., Vol. III, p. 391.

Indeed, we submit that when Congress included a prohibition on the "reexamination of facts" in the Seventh Amendment other than as according to the rules of the common law, it sought to prevent a court from resolving as opposed to reviewing, issues of fact. Congress did not intend to preclude the mere grant of a new trial following a review of the factual record. This is evidenced by the provision in Section 4 of the Judiciary Ac, of 1789, granting "*all* courts of the United States" power to grant new trials.

D. *The Seventh Amendment Was Intended To Preserve Fundamental Rights, Not Antiquated Procedures*

Petitioner's effort to limit the review of jury verdicts to precisely the archaic form of review that existed under English common law is untenable, given the differences between today's federal practice as opposed to that followed by courts in 1700's England. Petitioner's method of circumscribing the scope of review of jury verdicts by resort to the structural forms effective in 1700's England, if accepted, would bring the federal judicial system as we know it to a grinding halt. Taken to their logical conclusion, petitioner's and his *amici's* arguments would force a return to ancient judicial review practices in fear that some aspect of the review authorized today was not available then and, therefore, "reexamines a fact found by a jury other than according to the rules of the common law." Such a suggestion truly elevates form over substance.

That this was not the Seventh Amendment's intent is evidenced by contemporaneous events. The federal judicial system created by the same congress which adopted the Seventh Amendment, though similar,

did not mirror the English judicial system. The federal scheme incorporated many significant differences including the simultaneous functioning of state and federal courts, and creation of a unified and interconnected court system which could exercise both equitable and legal jurisdiction simultaneously. English procedures were not immutable fixtures in federal court practice.

Moreover, petitioner's form-over-substance reading of the Seventh Amendment would render every district court jury verdict completely immune from judicial review, for neither our district courts nor our circuit courts precisely mimic the *en banc* panel which performed that function in ancient England. Rather than buttress rights to a jury trial, however, petitioner's approach would undermine one of the key safeguards engrafted onto and incorporated within the right to a jury trial as it existed at English common law, i.e., a review for a new trial by "the Court above". The point was recognized by this Court in *Capital Traction Co. v. Hof*, 174 U.S. 1, a15 (1898), when it said that court's "direction and superintendence was an essential part of the trial," and "[a]t the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict."

Plainly, some review of what went on at trial is required. As highlighted by the contemporaneous differences between the American and English judicial systems, there is no question but that the adopters of the Seventh Amendment could not have intended to impose the precise English practices of the 1700's as a rigid, unchanging model which, for generations to come, would be used to delineate the scope of judicial review of a jury verdict. See *Galloway v. United States*, 319 U.S. 372, 390-391 (1943) "Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791", the passage of time obscured much of the[earlier] procedure.

The confusion regarding the exact scope of permissible appellate review of jury verdicts is a perfect example of a procedure which has become clouded. However, even though the precise procedures may have become obscured, the essential fact that jury verdicts could in fact be reviewed and set aside by "a Court above", composed of judges who had not presided over the trial and who had

not themselves heard the evidence, is clear. Whether or not that panel was an appellate court, *per se*, and in exact form akin to our appellate tribunals, should not dictate whether or not appellate courts now in place are permitted to review jury verdicts. See *Dimick v. Schiedt*, 293 U.S. 474, 490 (1935) (dissenting opinion) (Seventh Amendment not intended "to perpetuate in changeless form the minutiae of trial practice.")

This very point was recognized by this Court earlier in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1930). There this Court, in upholding the right to a partial retrial, a practice which did not exist at the common law, recognized that "the constitution is concerned, not with form, but with substance. . . . Beyond this, the Seventh Amendment does not exact the retention of old form of procedure".

Indeed, with regard to the first clause of the Seventh Amendment, this Court repeatedly has recognized that the Amendment was not intended to carry over every feature of a jury trial that existed at the common law. See, *Colgrove v. Battin*, 413 U.S. 149, 157-158 (1973) (jury of six satisfies requirements of Seventh Amendment); *cf. Williams v. Florida*, 399 U.S. 78, 92-93 (1970) (jury of six satisfies requirements of Article 3). See *also, Tull v. United States, supra*, 481 U.S. 412, 426, where this Court once again noted that the Seventh Amendment was only intended to preserve the basic aspect of a trial by jury, holding that "only those incidents which are regarded as fundamental, as inherent in and of the system of trial by jury, are placed beyond the reach of the legislature."

Thus, Congress is unencumbered by the Seventh Amendment and is free to determine exactly which court and under precisely which procedures and mechanisms verdicts can be reviewed.

In the Judiciary Act of 1789, circuit courts had both original and appellate jurisdiction; the appellate jurisdiction of the circuit courts was limited to writs of error, and they were precluded from reviewing issues of fact. In 1891, in response to this Court's burgeoning case load, the federal circuit courts as we know them, i.e., with only appellate jurisdiction, were created. Laws of 1891, Ch. 517.

At that time the scope of circuit court review was broadened to include "appeals" as well as writs of error. *Id.*, Sec. 6. This clearly

expanded the appellate authority which had been given to circuit courts in 1789. Thus, as this Court recognized in *Capital Traction Co. v. Hof, supra*, 174 U.S. at 37, "[i]n all acts of Congress regulating judicial proceedings, the very word 'appeal' unless restricted by the context, indicates that *the facts, as well as the law*, involved in the judgment below *may be reviewed in the appellate court*." (Emphasis Added). That Congress intended to expand the very scope of circuit court appellate review also is underscored by the fact that, in the 1948 amendment of the judiciary code, the language in the Judiciary Act of 1789 which had limited the jurisdiction of the circuit courts solely to issues of law, was omitted. 28 U.S.C. §2105 and §2106. Accordingly, the Judiciary Act can no longer be viewed as a bar to a review of facts by the circuit courts. Case Note, *Federal Courts' Review by Courts of Appeals*, 65 Harvard L.R., 1064, 1065 (1952); Comment, *Federal Appellate Review of Excessive or Inadequate Damage Awards*, 28 Fordham L.R. 500, 502 (1959). That circuit courts have not exercised their full statutory mandate, whether due to historical inhibition, force of earlier dicta or self-restraint is beside the point. Some factual review is statutorily available.

The foregoing makes clear (a) that the Seventh Amendment intended to permit judicial review of jury trials to the extent substantively permitted at common law, without regard to the exactitude of procedural conformity to ancient English practices; (b) that under English common law, judicial review of facts for the purpose of determining whether or not to direct a new trial *was* authorized to be undertaken by "the Court above", whether or not that court was precisely the equal of our circuit courts; and (c) that Congress' expansion of the role of circuit courts to permit review of facts in order to determine whether a new trial is appropriate is entirely consonant with the English common law and, hence, fully consistent with the Seventh Amendment.

POINT IV

PETITIONER AND AMICI HAVE NOT MET THE HEAVY BURDEN WHICH IS PLACED UPON PARTIES SEEKING TO HAVE A WELL-SETTLED, POLICY-BASED PRACTICE DECLARED UNCONSTITUTIONAL. DISPLACEMENT OF THE UNIVERSAL PRACTICE OF REVIEW FOR EXCESSIVENESS IS UNWARRANTED.

It is by now the settled rule in every circuit and in virtually every state that appellate courts have the power to reverse a judgment and order a new trial on grounds that an award of damages is excessive. The practice should not lightly be cast aside. In order to displace such a well-settled practice as unconstitutional, petitioner must dispositively satisfy a very heavy burden. *See Payton v. New York*, 445 U.S. 573, 600 (1980). This petitioner and his *amici* have clearly failed to do. As we demonstrated above, their arguments display an understanding of the Seventh Amendment and an historical analysis of the common law which are inaccurate in critical particulars. The arguments do not justify the drastic result sought on this appeal.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S.1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court recognized that the Constitution imposes a substantive limit on the size of punitive damages. The same, we submit, must be true with regard to compensatory damage awards. There is a line beyond which any award leaves the realm of compensation and enters the realm of excessiveness. In punitive damage cases it is a question of over-punishment. In compensatory damage awards, the question is one of over-compensation. In *Honda v.Oberg, supra*, 512 U.S. __, 29 L.Ed.2d 349, this Court observed that judicial review of an excessive verdict was "a well-established common-law protection against arbitrary deprivations of property", and cited to the availability of meaningful and adequate trial court review *as well as the availability of subsequent appellate review*, as among the procedural elements insuring that defendants will not arbitrarily be deprived of property. We submit that before one of these crucial safeguards is eliminated, this Court should overwhelmingly be convinced that appellate review for excessiveness and routine remittitur

practice are absolutely prohibited by the Seventh Amendment. Petitioner and his *amici* have failed to meet that burden.

As demonstrated above, English common law appellate courts were authorized to review and set aside excessive jury verdicts. At best, petitioner's arguments raise questions as to exactly what the scope of that appellate review was. Moreover, their version of history is belied by cogent historical analysis. See Judge Holmes' elaborate discussion in *Sunray v. Allbritton, supra*, 187 F.2d. at 477-489. Neither petitioner nor his *amici* have presented persuasive, irrefutable evidence supporting the notion that the Seventh Amendment precludes appellate review of an excessive jury verdict.

The problem of "runaway" verdicts is not new. Their impact is polycentric.[8] Focusing only upon so-called "blockbuster" or "mega-verdict" awards does not tell the whole story. Lesser verdicts are influenced upwards because "big" verdicts make "big" news so that jurors who read of a mammoth award may be influenced. Since only a small fraction of the mass of serious cases are tried, the "going rate" for settlement amounts also is critically affected by "runaway" awards. The upwards spiral feeds itself because attorneys and courts refer to the highest sustained awards for comparable exposures resulting in an

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8. See M. Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 Insurance L.J. 213, 226-231 (specifying sample high verdicts in reported cases; also results of a 15-month survey derived from a jury reporting service from July 1975 to September 1976 in which 45 torts awards and settlements exceeded $1,000,000, of which 17 were products cases); M. Hoenig, "'Runaway' Verdicts," *New York Law Journal*, May 24, 1984, p. 1, reprinted in M. Hoenig, Products Liability: Substantive Procedural and Policy Issues, Ch. 44, pp.337-344 (Product Liability Advisory Council Foundation 1992) (hereinafter "Hoenig, Products Liability") (discussing both a New York and a national trend toward higher-range multi-million dollar personal injury verdicts including awards of $12 million, $15 million, $21.5 million; $35 million; and even $100 million); M. Hoenig, "'Runaway' Verdicts and the Liability Crisis," *New York Law Journal*, June 30, 1988, p. 3, reprinted in Hoenig, Products Liability, Ch. 69, pp. 574-583 (discussing continued trend towards higher personal injury verdicts including awards in the $40 million range); M. Hoenig, "Reducing Excessive Verdicts," *New York Law Journal*, Aug. 25, 1988, p. 3, Products Liability , Ch. 71, pp. 595-601 (discussing what New York appellate courts are doing to reduce excessive verdicts under the "material deviation from reasonable compensation" standard of N.Y. CPLR 5501(c) and surveying reported cases involving remittiturs).

escalation of sustainable verdicts as well as settlements. In effect, yesterday's "ceiling" becomes today's "floor" and next year's "insufficient" or "inadequate" level.

Although many mundane tort exposures do not result in "runaway" verdicts, there are classes of serious injury exposures, commonly called "catastrophic" injuries (e.g., quadriplegia, paraplegia and brain damage) that inevitably lend themselves to overwhelming jury sympathy and constitute fertile subjects for impassioned and forceful advocacy. Claimants' counsel unabashedly make no apologies for developing strategies and tactics designed to maximize jury awards, a quest they sometimes euphemistically describe as seeking an "adequate" award. See Novok, *Presenting Plaintiff's Case*, 5 Am. Jur., Trials 611, 669 (1966) (urging emotional description of pain). Thus, for example, "day-in-the-life-of-the-plaintiff" videotapes dramatically depict the gravely injured plaintiff struggling to get through the day. The potential that juries will be emotionally influenced and prejudiced is great. See *e.g., Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987) (court articulates steps trial judge should consider to eliminate prejudice); *Grimes v. Employers Mutual Liability Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977) (prejudicial effect of plaintiff with his injured brother).

Further, there are certain classes of cases, which Rand Corporation's Institute for Civil Justice (ICJ) called "high stakes personal injury suits," in which the growth in average award "has been truly explosive reflecting increases ranging from 200 to more than 1,000 percent." Hensler, Vaiana, Kakalik & Peterson, *Trends in Tort Litigation, The Story Behind the Statistics*, Report No. R-3583-ICJ, at pp. 17-18 (The Institute for Civil Justice 1987) (Rand Corp., Santa Monica, Calif.). These "high stakes" suits include products liability, malpractice, business torts, and mass latent injury claims such as asbestos and Dalkon Shield. In a products liability or malpractice case juries were found "likely to award substantially more money" than in a routine auto case for an injury of the same severity. *ICJ Report*, at 21. Juries also awarded higher verdicts when defendants were institutions or organizations, which the study called the "deep pocket effect." Although the largest awards were later reduced, such reductions were

"smaller" when products liability or deep pocket defendants were involved. *Id.* at 21, 22.

The foregoing illustrations, barely scratching the surface of the many artful tactics and complex factors influencing jurors' issuance of "runaway" verdicts, show that safeguards imposed solely at the trial level are not enough. Appellate courts, even when exercising great deference to trial court discretion, frequently have to reverse for a variety of prejudices tolerated by trial judges. The same dynamics apply when it comes to excessive verdicts. Were it otherwise, new trials and remittiturs by appellate courts would not occur with frequency. But they do.

The purposes of tort law are to *fairly* compensate for injury and loss, to allocate and spread the risk of the costs of injuries, and to deter misconduct. See Keeton, Dobbs, Keeton, Owen, Prosser and Keeton On Torts, Ch. 1, § 4, pp. 20-26 (5th ed. 1984). None of these policies are served when excessive verdicts are sustained. On the contrary, when windfall awards slip through the review process these policies are undermined. One of the adverse consequences, among many, is creation of a "liability crisis" or "insurance crisis." See M. Hoenig, "'Runaway' Verdicts and the Liability Crisis," *New York Law Journal*, June 30, 1988, p. 3 (discussing discerning law review articles by Professor George L. Priest in the context of "runaway" verdicts); G.L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987); G.L. Priest, *The Liability Crisis*, Yale Law Report (Fall 1987). Professor Priest views evolution of expansive modern tort law as "chiefly motivated by the concern of courts to provide insurance to victims who have suffered personal injury." 96 Yale L.J. at 1525. But "exactly the opposite effect" has occurred. There is a "reduction in total insurance coverage available to society rather than an increase." *Id.* The result is regressive and hurts the poor. Thus the persons most drastically affected by expanded liability and the current insurance crisis are the low-income and poor, exactly the parties that courts had hoped most to aid. *Id.* at 1525, 1585-87. "Runaway" awards help fuel these problems. The role of appellate review in minimizing the foregoing problems was recently recognized by the Second Circuit in *Consorti v. Armstong World Industries, Inc.*, 72 F.3d 1003, 1009 (2d Cir. 1995).

Petitioner's strained argument that review of verdicts by trial courts is sufficient, (Pet. Br. at 38), places too great a reliance upon overworked and overburdened trial judges. It ignores as well the simple reality that trial courts, too, sometimes make mistakes, and sometimes abuse their discretion, or sometimes act upon misinformation by the parties or their counsel. The suggestion that appellate courts should have no choice but to rubber stamp a grossly excessive verdict - for example our hypothetical award of $100 million for an ankle injury in a simple slip and fall case merely because a grossly excessive award was not set aside by the trial court is untenable. Federal appellate courts independently have erected safeguards to insure that a denial of a new trial by the trial court is not lightly reversed. Circuit courts consistently hold that such trial court determinations are entitled to great deference. See, e.g., *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990); *Seidman v. American Airlines, supra*, 923 F.2d 1134. Further, tests such as "insufficiency of evidence", "material deviation from reasonably compensation" and "shock the conscience" impose additional standards guaranteeing that appellate relief for excessiveness is reached only after restrained consideration.

Experience shows appellate review to be an effective additional safeguard against excessive verdicts.[9] A valuable, widely accepted

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9. To illustrate the significance of the remittitur practice by appellate courts in controlling excessive awards, see, *e.g.*, *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1015 (2d Cir. 1995) cert. pet. filed ($12 million award for pain and suffering reduced to $3.5 million); *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1555 (7th Cir. 1990) (award of $4 million for breach of contract reduced to $525,000); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (award of $1.5 million for pain and suffering reduced to $750,000); *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1142 (5th Cir. 1991) (award of $487,000 for pain and suffering reduced to $227,000); *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990) (award of $8.3 million for *medical malpractice* reduced to $850,000 per statutory cap); *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir, 1985) ($2.8 million award for loss of consortium reduced to $892,000). Additionally, a leading treatise on products liability, citing a federal study, has noted the significant impact of post-trial activities, including remittiturs and appeals, on overall jury awards. See 4A American Law of

(continued...)

means of protecting against runaway verdicts should not be condemned as unconstitutional absent irrefutable proof that the constitution is violated. Such a showing has not been made. Instead, it appears that the practice of setting aside excessive verdicts and granting new trials and remittiturs was widely accepted by the common law as fully consistent with the right to a jury trial. The incorporation of such review into current federal practice, whether under an abuse of discretion standard or whether review of facts is required, is fully consistent with the practice at common law and does not offend the Seventh Amendment.

(...continued)

Products Liability 3d, Damages, para. 60:17, p. 45 ("Post trial activities . . . resulted in final outcomes different from the initial verdicts in 30 percent of all cases, having the net effect of reducing the total amount paid across all cases 43 percent.")

CONCLUSION

For all of the reasons set forth herein, *Amicus* urges this Court to affirm the order appealed from, and to uphold the practice of appellate review of excessive verdicts and issuance of remittiturs.

Respectfully submitted,

MICHAEL HOENIG, ESQ.
Counsel of Record

DAVID B. HAMM, ESQ.
MIRIAM SKOLNIK, ESQ.
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for Product Liability Advisory Council, Inc.

HUGH F. YOUNG, JR., ESQ.
Product Liability Advisory Council, Inc.
Suite 510
1850 Centennial Park Drive
Reston, Virginia 22091
(703) 264-5300
Of Counsel

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